

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**JAYLENE S. BARGMAN**

Claimant

V.

**SALINA REGIONAL HEALTH CENTER, INC.**

Self-Insured Respondent

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Docket No. 1,070,243

**ORDER**

Claimant appealed the February 22, 2016, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on July 14, 2016.

**APPEARANCES**

Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Jared T. Hiatt of Salina, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed claimant sustained a torn left meniscus by accident arising out of and in the course of her employment.

**ISSUES**

ALJ Jones awarded claimant permanent partial disability benefits based upon a 2% left lower extremity functional impairment. The ALJ found claimant's March 27, 2014, work accident was not the prevailing factor for her left total knee replacement and, therefore, denied claimant's requests for payment of medical bills and temporary total disability (TTD) benefits related to her knee replacement. The ALJ found claimant was not entitled to future medical benefits.

Claimant contends her work accident was the prevailing factor for her injury and need for medical treatment, including the total knee replacement. Claimant requests payment for the medical bills associated with the knee replacement and TTD benefits for the period from June 25 to August 14, 2014. Claimant also requests future medical benefits and an increase in her functional impairment.

Respondent requests the Board affirm the ALJ's Award.

The issues are:

1. Was claimant's March 27, 2014, work accident the prevailing factor causing her need for a left total knee replacement?
2. If so, what is the nature and extent of claimant's disability and is claimant entitled to TTD benefits from June 25, 2014, to August 14, 2014?
3. Is claimant entitled to future medical benefits?

#### **FINDINGS OF FACT**

On March 27, 2014, claimant, a specialty technician for respondent, was transporting a patient on a gurney to another floor. Claimant parked the gurney near an elevator and the patient grabbed the side of the gurney, causing it to strike claimant's left knee. Claimant did not fall and completed her task of taking the patient to another floor.

Claimant went to respondent's emergency room on the same day as her accident. X-rays of the left knee showed the patella was intact, no acute fracture, no dislocation and osteoarthritis, including mild loss of joint space and spurring at the medial compartment. An April 2, 2014, left knee MRI revealed degenerative changes affecting all three compartments, a torn medial meniscus posterior horn, a Baker's cyst, medial collateral bursitis, and bony spurring, particularly to the medial compartment, which showed some narrowing.

Eventually, claimant was referred to orthopedic surgeon Dr. Gary L. Harbin, who surgically repaired her torn left meniscus. According to claimant, Dr. Harbin told her there was a tear in the cushion between her bones. After the surgery, claimant's condition improved for a time. However, her left knee became painful after walking for 12 hours a day. On June 25, 2014, Dr. Harbin surgically replaced claimant's left knee. After the left total knee replacement, claimant's symptoms became much better and she is "totally happy"<sup>1</sup> with the replacement. After being off work following the knee replacement, claimant returned to work on August 14, 2014.

Claimant testified her left knee was her good knee and indicated she had three prior right knee surgeries. She testified she did not recall having problems with or previously seeing a medical provider for her left knee. Claimant confirmed she told orthopedic physician Dr. Pat D. Do that she never had prior left knee issues. When asked about

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<sup>1</sup> R.H. Trans. at 18.

injuring her left knee in 2002, receiving an injection, seeing Dr. Harbin and undergoing physical therapy, claimant did not recall.

Dr. Harbin previously saw claimant in September 2002 for left knee pain. Dr. Harbin's physical examination revealed crepitus in both of claimant's knees. Dr. Harbin's left knee diagnosis was patellar chondromalacia. The doctor could not rule out a meniscus injury, but if claimant had such an injury, it was not the cause of her symptoms. Claimant was referred to Dr. Harbin by her family doctor, who had injected her left knee with cortisone. Claimant reported catching and popping. Dr. Harbin testified claimant was probably having some swelling associated with a minor sprain or arthritis.

For claimant's 2014 injury, Dr. Harbin first examined claimant's left knee on April 9, 2014. After reviewing x-rays and an April 2 MRI and physically examining claimant, the doctor diagnosed claimant with possible left bucket handle knee tear and advanced left knee arthritis. The doctor testified the MRI showed a medial meniscus tear and not a lateral meniscus tear.

On April 18, Dr. Harbin performed arthroscopic surgery on claimant's left knee. He testified the purpose of the surgery was to repair claimant's meniscus and to evaluate the rest of her joint. During surgery, the doctor discovered claimant had a torn lateral meniscus, not a torn medial meniscus. His postoperative diagnoses were patellofemoral grade 4 arthritis,<sup>2</sup> grade 3+ medial condyle lateral meniscus tear operation, arthroscopy, femoral shaving for loose flaps of cartilage and partial lateral meniscectomy, synovitis. The doctor's operative notes state, "Injuries with the knee most likely were further damaged to the arthritic process on the medial condyle and the lateral meniscus."<sup>3</sup>

Claimant saw Dr. Harbin on May 28. Claimant reported having difficulty sitting for a period of time, walking with a limp, having to take stairs one at a time and her knee giving out. Because claimant had sufficient symptoms to render her nonfunctional at work, was having issues with activities of daily living and the arthroscopy revealed grade 4 changes on the medial femoral condyle, a decision was made to replace her left knee. A June 9 note of Dr. Harbin indicated claimant had a 15 percent lower extremity functional impairment for chronic arthritis, which would be apportioned. Dr. Harbin replaced claimant's left knee on June 25. His postoperative diagnosis was left knee osteoarthritis. The doctor estimated he has performed 7,000 total knee replacements.

Dr. Harbin testified claimant's lateral meniscus tear was the only acute injury suffered in her work accident. He averred claimant's knee replacement was for

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<sup>2</sup> Dr. Harbin testified grade 1 is mild softening damage to the cartilage, grade 2 is fragmentation or fraying, grade 3 is the cartilage is almost worn off and grade 4 is only bone.

<sup>3</sup> Harbin Depo., Ex. C.

degenerative medial changes, not for the lateral meniscus tear. Dr. Harbin opined that even without having a torn meniscus, within five years, claimant would need a total knee replacement. The doctor testified, “Now, one thing you always have to realize is any patient with arthritis that has an injury, an injury can accelerate the date and timing for a total knee.”<sup>4</sup> He also testified, “The reason for the knee replacement doesn’t have any direct relationship to the meniscus tear, other than you know the knee was traumatized.”<sup>5</sup>

Dr. Harbin opined claimant’s accident was the prevailing factor causing her torn left lateral meniscus. Using either the fourth or fifth edition of the *Guides*,<sup>6</sup> Dr. Harbin assigned claimant a 5 percent left lower extremity functional impairment for her meniscus tear. The doctor opined claimant’s accident was not the prevailing factor causing her need for a total knee replacement, but was a prevailing factor causing the timing of her left knee replacement. He opined arthritis was the prevailing factor causing her need for a total knee replacement.

According to Dr. Harbin, claimant will not need future medical treatment for her torn meniscus. He indicated if claimant’s left knee replacement did not fail, she would not need future medical treatment for her left knee and noted there is a .25 to .5 percent failure, per year, of total knee replacements.

At the request of her counsel, claimant was evaluated by Dr. George G. Fluter, a board-certified physical medicine and rehabilitation physician, on August 27, 2014. The doctor took a history, reviewed claimant’s records and physically examined her. Dr. Fluter’s assessments were status post work-related injury, left knee pain, left knee internal derangement, status post left knee arthroscopy and status post left total knee replacement surgery. He opined that within a reasonable degree of medical probability “there is a causal/contributory relationship between Ms. Bargman’s current condition and the reported work-related injury occurring on 03/27/14 and its sequelae.”<sup>7</sup> The doctor’s report stated:

Ms. Bargman was found to have internal derangement of the left knee as well as arthritic changes. While the arthritic changes, more likely than not, were present prior to the injury occurring on 03/27/14, the internal derangement, more likely than not, was the result of the injury on that date. The internal derangement was addressed at the time of the arthroscopy done on 04/18/14; however, this did not

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<sup>4</sup> *Id.* at 18.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment*.

<sup>7</sup> Fluter Depo., Ex. 2 at 5.

result in lasting benefit and led to the need for further surgical treatment culminating in joint replacement.<sup>8</sup>

Dr. Fluter testified internal derangement is a very nonspecific categorization of injury to a joint. He indicated claimant's MRI revealed she had a torn medial meniscus and he provided a detailed explanation of how a meniscus functions. He also testified claimant had bursitis affecting the medial collateral ligament. The doctor opined claimant's work injury was the prevailing factor causing her injury and need for treatment, including both her arthroscopy and total knee replacement. When asked if claimant's need for a total knee replacement was the result of her work accident, Dr. Fluter testified:

Well, yes, I do, in the sense that she had arthritic changes of the knee beforehand. I think that we can say that that's true based on the initial X[-]ray and the MRI scan and then also Dr. Harbin's findings on examination. She was asymptomatic prior to that time. You know, whether or not she would have needed a knee replacement at some point in time is speculative. She may have, but we don't know that because she didn't have any symptoms. She had an injury in March, 2014, which showed some internal derangement, as well as the arthritic changes. She had the arthroscope, which didn't really resolve things, and then three months after the injury she's having the knee replaced. And so temporally, you know, the timing relationship would seem to me that it's related to the injury as opposed to the arthritic change. She may not have ever had to have a knee replacement in absence of an injury. So that's why in my opinion I think it is. The timing of it certainly suggests that it's related to the injury and not just the development of arthritic changes.<sup>9</sup>

Dr. Fluter confirmed that whether claimant had prior left knee symptoms was important in his analysis. He indicated claimant reported no prior left knee symptoms. Dr. Fluter testified his opinions were not altered by the fact that in 2002, claimant reported pain, popping, catching and grinding in her left knee and received a cortisone injection, because that occurred 12 years earlier.

When asked about future medical treatment, Dr. Fluter testified claimant would need medication management for anti-inflammatory, adjuvant and pain medications. He also recommended physical therapy, a TENS unit trial, a soft knee brace, steroid injections and an orthopedic follow-up with Dr. Harbin. Dr. Fluter assigned claimant restrictions and indicated those restrictions could change, but provided no functional impairment rating. He confirmed he has never performed a meniscectomy or a knee replacement.

Dr. Do conducted a court-ordered evaluation of claimant on March 23, 2015. The doctor opined, within a reasonable degree of medical probability, that claimant's work

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 26-27.

accident was the prevailing factor for her torn left lateral meniscus, but not her need for a total knee replacement. In his report, Dr. Do elaborated:

Within a reasonable degree of medical probability, the work accident of March 27, 2014, was a “triggering”, or at most “rendering a preexisting condition symptomatic”. My rationale behind this is that I reviewed the x-rays done on March 27, 2014, which already showed quite a bit of wear and tear and the MRI scan of April 2, 2014, which already showed quite a bit of wear and tear and was corroborated by Dr. Harbin’s operative report of April 18, 2014, that shows wear and tear down to bone and where she had most of her wear and tear was in the bony compartments of the patellofemoral joint and the [weight bearing] portion of the medial compartment. Neither of those two compartments had any kind of acute findings. Her wear and tear was certainly preexisting, in my opinion. And where Dr. Harbin found a lateral meniscus tear, that compartment of her knee looked good. So in summary, within a reasonable degree of medical probability, the need for total knee replacement is a natural and probable consequence of aging, and **NOT** due to her work-related injury of March 27, 2014.<sup>10</sup>

Using the *Guides* (4th ed.), Table 64, page 85, Dr. Do assigned claimant a 2 percent left lower extremity functional impairment for her partial lateral meniscectomy and a 37 percent left lower extremity functional impairment for her total knee replacement for a combined 39 percent left lower extremity functional impairment. The doctor opined claimant did not need future medical treatment for her torn meniscus.

Dr. Do agreed that in order for claimant to undergo a total knee replacement, there has to be degeneration, a failure of conservative treatment and unrelenting pain. If claimant was asymptomatic, a total knee replacement should not be performed. The doctor conceded a knee replacement would not be performed if claimant had left knee symptoms and minimal treatment in 2002 and no symptoms for 12 more years. He acknowledged that claimant, as a result of her accident, developed constant, unrelenting knee pain and the knee replacement would not have been performed had she not had pain. Dr. Do confirmed the torn meniscus caused pain, and the pain was unrelieved by the meniscectomy or by conservative treatment.

#### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>11</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue

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<sup>10</sup> Do Depo., Ex. B at 3.

<sup>11</sup> K.S.A. 2013 Supp. 44-501b(c).

is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”<sup>12</sup>

K.S.A. 2013 Supp. 44-508 states, in pertinent part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

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<sup>12</sup> K.S.A. 2013 Supp. 44-508(h).

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Several Board cases denied compensability in cases involving total knee replacement surgeries where a worker had preexisting knee arthritis. These cases are fact-driven and depend on the specific evidence in each case. In *Berkley Frye*,<sup>13</sup> the worker injured her knee and had a total knee replacement. The treating doctor testified Berkley Frye's accident resulted in an aggravation of her underlying degenerative disease/osteoarthritis and the prevailing factor in her need for a total knee replacement was her preexisting arthritis, not her accident. A single Board Member ruled Berkley Frye solely had an aggravation of a preexisting condition and her accident was not the prevailing factor in her injury and medical condition.

*Dempsey*<sup>14</sup> involved a worker who struck her knees. She had arthroscopic surgery, a partial meniscectomy, a partial synovectomy, chondroplasty of the patellofemoral joint and debridement and several left knee aspirations. Subsequently, an MRI revealed significant degenerative changes in Dempsey's left knee. Her treating doctor indicated Dempsey needed a total knee replacement. Her doctor stated Dempsey's injury made her previously asymptomatic knee arthritis worse and the prevailing factor in her need for surgery was her preexisting condition, with her injury only contributing to and speeding up her needing the surgery earlier in life. The doctor later opined the accident was the prevailing factor because her asymptomatic arthritis was made symptomatic because of her fall. The ALJ denied compensability for the total knee surgery, finding Dempsey's injury solely rendered a preexisting condition symptomatic, without ruling on the prevailing factor requirement. A single Board Member affirmed.

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<sup>13</sup> *Berkley Frye v. Angmar Medical Holdings, Inc.*, Nos. 1,059,923 & 1,059,925, 2012 WL 6101123 (Kan. WCAB Nov. 30, 2012).

<sup>14</sup> *Dempsey v. Saint Raphael Nursing Services, Inc.*, No. 1,065,128, 2014 WL 3055458 (Kan. WCAB June 23, 2014).



In *Moore*,<sup>15</sup> a worker struck his knee on concrete. The treating doctor stated Moore's accident resulted in him aggravating his preexisting osteoarthritis. The treating doctor noted the prevailing factor in Moore's symptoms and need for treatment was his preexisting osteoarthritis, not his work accident. A single Board Member concluded Moore's injury was solely an aggravation of a preexisting condition and rendered the preexisting condition symptomatic, thus not compensable.

*Kornmesser*<sup>16</sup> was a decision entered by the entire Board. Kornmesser injured her knee at work. Her employer accepted as compensable menisci tears and she had surgery for the same. Thereafter, she sought additional treatment, including a total knee replacement. Three doctors provided expert opinions. The treating doctor indicated claimant had very significant preexisting arthritis and treatment should be paid under Kornmesser's private insurance. Kornmesser's hired medical expert opined her accident aggravated and accelerated her asymptomatic, preexisting arthritis and her need for a total knee replacement. The court-ordered physician concluded Kornmesser had significant degenerative joint disease and her injury aggravated such condition, but her need for additional treatment was due to her preexisting arthritis, not the work accident. The ALJ placed more evidentiary weight in the opinions of the treating and court-ordered physicians. The ALJ denied Kornmesser's request for treatment of her arthritic condition. The Board agreed Kornmesser's accident was not the prevailing factor in her medical condition or disability, including her need for additional treatment. For reasons cited by the ALJ, the Board agreed the opinion of Kornmesser's hired medical expert was not as credible as the treating and court-ordered doctors' opinions.

Cases like *Dempsey*, *Berkley Frye*, *Moore* and *Kornmesser* demonstrate that determining whether there is solely an aggravation or whether the prevailing factor requirement is met depends on the facts and medical evidence specific to the case. The instant case is similar to the above-noted cases.

Claimant asserts her work accident was the prevailing factor causing her need for a left total knee replacement and resulting functional impairment. She argues that three requirements must be met before a total knee replacement occurs: (1) acute or longstanding degeneration of knee cartilage, (2) unrelenting pain and (3) a failure of conservative treatment. Claimant contends the first requirement was proven by Dr. Do's testimony that claimant's work accident was the prevailing factor causing her meniscus tear and need for surgery and Dr. Harbin's admission that claimant's work accident caused a traumatic injury to the joint cartilage.

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<sup>15</sup> *Moore v. Jackson Farmers, Inc.*, No. 1,071,835, 2015 WL 996905 (Kan. WCAB Feb. 27, 2015).

<sup>16</sup> *Kornmesser v. State*, No. 1,057,774, 2015 WL 2169348 (Kan. WCAB Apr. 2, 2015).

Claimant misapplies the opinions of Drs. Do and Harbin. Neither of those physicians opined claimant's accident caused acute or longstanding degeneration of her left knee cartilage. Dr. Do opined, within a reasonable degree of medical probability, that claimant's work accident was the prevailing factor for her torn left lateral meniscus, but not her need for a total knee replacement. Dr. Harbin indicated claimant's accident was not the prevailing factor causing her need for a total knee replacement, but was a prevailing factor causing the timing of her left knee replacement. He opined arthritis was the prevailing factor causing her need for a total knee replacement.

The Board finds the prevailing factor opinions of Drs. Do and Harbin more persuasive than Dr. Flutter's opinion. Dr. Do was court appointed and Dr. Harbin treated claimant and saw her several times. Dr. Flutter was employed by claimant and saw her on one occasion. Drs. Do and Harbin are orthopedic physicians and Dr. Flutter is not. Dr. Harbin indicated he had performed 7,000 total knee replacements. Conversely, Dr. Flutter has never performed a meniscectomy or a total knee replacement.

Claimant failed to prove her accident was the prevailing factor causing her need for a left total knee replacement. The Board adopts the 2 percent functional impairment rating of Dr. Do. He was a neutral court-appointed physician. Dr. Harbin assigned claimant a 5 percent functional impairment using the fifth or fourth edition of the *Guides*. The Board is uncertain which edition of the *Guides* Dr. Harbin used, but is certain Dr. Do used the fourth edition of the *Guides*. Claimant has a 2 percent left lower extremity functional impairment and is not entitled to TTD benefits.

Drs. Do and Harbin opined claimant needed no future medical treatment for her torn left meniscus. Dr. Flutter indicated claimant needed future medical treatment. However, the medical treatment he recommended was for claimant's knee replacement. Dr. Flutter was never asked if claimant needed future medical treatment for her torn left meniscus. Moreover, as pointed out above, Drs. Harbin and Do are experienced orthopedic surgeons, while Dr. Flutter is not.

### **CONCLUSIONS**

1. Claimant failed to prove her accident was the prevailing factor causing her need for a left total knee replacement.
2. Claimant has a 2 percent left lower extremity functional impairment.
3. Claimant is not entitled to temporary total disability benefits.
4. Claimant is not entitled to future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>17</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board affirms the February 22, 2016, Award entered by ALJ Jones.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Honorable Gary K. Jones, Administrative Law Judge

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<sup>17</sup> K.S.A. 2015 Supp. 44-555c(j).